Ramachandram s/o Appalanaidu & Ors v Dato Bandar Kuala Lumpur & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–607 OF 2010
RAMLY ALI, JEFFREY TANAND ZAHARAH IBRAHIM JJCA
24 AUGUST 2012

Administrative Law — Judicial review — Application for — Review of decision of first respondent granting development order — Whether development order void — Whether first respondent required to conduct public hearing before issuing development order — Whether first respondent failed to comply with ss 21 and 22 of the Town and Country Planning Act 1976 ('TCPA 1976') — Whether TCPA 1976 applied to Federal Territory — Town and Country Planning Act 1976 ss 21 & 22 — Town and Country Planning (Amendment) Act 2001 s 1(5)

Statutory Interpretation — Construction of statutes — Whether s 1(5) of the Town and Country Planning Act 2001 conferred upon Minister express power to bring Town and Country Planning Act 1976 ('TCPA 1976') into force in Federal Territory — Whether r 5 of the Planning (Development) Rules 1970 as amended inconsistent with s 22 of the TCPA 1976 — Town and Country Planning Act 1976 ss 21 & 22 — Town and Country Planning (Amendment) Act 2001 s 1(5) — Planning (Development) Rules 1970 r 5

The Dato Bandar Kuala Lumpur ('the first respondent') had granted Gasing Meridien Sdn Bhd ('the second respondent'), the owner of 71 lots of land in Kuala Lumpur ('the subject land'), a development order to develop the subject land. The appellants, who claimed to be owners of properties adjoining the subject land, applied for judicial review to quash the development order. The appellants submitted, inter alia, that the first respondent had not complied with ss 21 and 22 of the Town and Country Planning Act 1976 ('the TCPA 1976'), which provide for public hearings of objections in any application for planning permission. It was therefore the appellants' contention that the development order, which was issued by the first respondent without conducting a public hearing, was void. There was no issue that to bring the TCPA 1976 into operation in the Federal Territory of Kuala Lumpur ('FT'), there had to be a gazette notification by the Minister. The appellants contended that the TCPA 1976 had been brought into operation in the FT by the Minister's appointment of the date of coming into force of the Town and Country Planning (Amendment) Act 2001 ('the TCPA 2001') in the FT, while the respondents argued that the TCPA 1976 was a general town and country planning law that did not apply to the FT. The respondents submitted that the

Minister could not bring the TCPA 1976 into operation in the FT without repeal of the Federal Territory (Planning) Act 1973 ('the FTPA'), a specific legislation that was applicable only to the FT. In reply the appellants submitted that the TCPA 1976 must be read harmoniously with the FTPA. The appellants also submitted that r 5 of the Planning Development Rules 1970 as amended by the Planning (Development) (Amendment) Rules 1994 ('r 5') was no longer operative for being inconsistent with s 22 of the TCPA 1976. The High Court judge dismissed the appellants' application for judicial review to quash the development order, and hence the present appeal. In determining the issue of whether the appellants had a right to claim a public hearing this court had to first determine whether the TCPA 1976 had been made applicable and was presently in force in the FT.

Held, dismissing the appeal with no order as to costs:

(1) This court found that s 1(5) of the TCPA 2001 did not confer upon the Minister the express power to bring the TCPA 1976 into force in the FT. The mere appointment of a date of coming into force of the TCPA 2001 could not also have the effect of making the TCPA 1976 applicable to the FT. In any case the TCPA 2001 did not make any amendment to s 21(7) of the TCPA 1976, which was the provision granting the right of public hearing that was being claimed by the appellants (see paras 32–36 & 38–39).

(2) The two pieces of legislation that should be read harmoniously together were not the TCPA 1976 and the FTPA but the TCPA 2001 and the FTPA. In this court's view the way to read the TCPA 2001 and the FTPA harmoniously was to read those provisions of the TCPA 2001 that were applicable to the FT of KL to constitute a separate piece of legislation that should be read and construed as part of the corpus of town planning laws of KL. However, where the provisions of the TCPA 2001 were inconsistent with the provisions of the FTPA, the provisions of the FTPA should prevail, as the provisions of the FTPA were provisions of a town planning legislation designed specifically for KL. In this context, this court agreed with the High Court judge's application of the maxim *'generalia specialibus non derogant'*. Thus, the effect of the gazette notification was merely to bring into force in KL those provisions of the TCPA 2001 which created the new supervisory regime with the objective of ensuring uniformity of law and policy. The Minister's appointment of a date of coming into force of the TCPA 2001 did not have the effect of bringing the rest of the TCPA 2001 or any part of the TCPA 1976 into operation in KL (see paras 42,43, 49–54).

(3) Consequently the question of according the appellants a public hearing under the TCPA 1976 of their objections to the development on the subject land did not arise (see para 56).

(4) As the TCPA 1976 did not apply to KL, the issue of r 5 being inconsistent with the provisions of the TCPA 1976 did not arise. Further, under r 5 the right to object to applications for planning permission in respect of a development was limited to applications which involved an 'increase in residential density or change of the use of land' but the development order in the instant case did not involve such an issue. As such, r 5 did not apply to the present case and the appellants did not acquire a right of hearing under the rule (see paras 60–63).

(5) The first respondent had clearly taken into consideration matters, which were in his discretion, expedient or necessary for the purpose of proper planning in relation to the development on the subject land. Having imposed the conditions that actually addressed the main concerns of the appellants, the first respondent had exercised his discretion under s 22 of the FTPA reasonably in issuing the development order. Thus, this court found that the High Court judge had made the correct decision in dismissing the appellants' applications for judicial review. However, the High Court judge erred in his finding that the appellants' application was tainted by the inclusion of the five applicants who were not owners of the neighbouring lands. The High Court judge ought to have allowed the lima applicants to withdraw from the suit. Thus that part of the High Court judge's finding was set aside (see paras 68, 85, 86, 93–95).

(6) (per **Jeffrey Tan JCA, dissenting**) It was an undeniable fact that it was the TCPA 2001 that amended the TCPA 1976 and that without the TCPA 1976, the TCPA 2001 would be incomprehensible. When s 1(5) of the TCPA 2001 granted the Minister the power to appoint the date of coming into force of 'this Act', it meant the TCPA 1976 as amended by the TCPA 2001 being brought into operation in the FT. Thus, the TCPA 1976 as amended by the TCPA 2001 had to be read as a single text (see paras 16, 19 & 20).

(7) (per **Jeffrey Tan JCA, dissenting**) There was an obvious inconsistency between r 5, which provided for public hearings only in respect of applications which involved an 'increase in residential density or change of the use of land', and ss 21 and 22 of the TCPA 1976, which provided for public hearings of any application for planning permission. However, r 5 was a rule made under an Act, ie it was subsidiary legislation. It is trite law that any subsidiary legislation that was inconsistent with any Act would be void to the extent of the inconsistency. In Malaysia, that general principle of statutory interpretation is codified in s 23 of the Interpretation Act. Thus, the appellants were bestowed with the right to object and to be heard, as s 21(7) of the TCPA 1976 as amended required the first respondent to hear the appellants (see paras 22 & 26).

[Bahasa Malaysia summary

Dato Bandar Kuala Lumpur ('responden pertama') telah memberikan Gasing Meridien Sdn Bhd ('responden kedua'), pemilik 71 lot-lot tanah di Kuala

Lumpur ('tanah subjek'), satu perintah pembangunan untuk membangunkan tanah subjek tersebut. Perayu-perayu, yang mendakwa pemilik-pemilik hartanah-hartanah tersebut yang bersebelahan dengan tanah subjek, telah memohon semakan kehakiman untuk membatalkan perintah pembangunan tersebut. Perayu-perayu berhujah, antara lain, bahawa responden pertama tidak mematuhi ss 21 dan 22 Akta Perancangan Bandar dan Desa 1976 ('APBD 1976'), yang memperuntukkan perbicaraan umum berhubung bantahan-bantahan dalam apa-apa permohonan untuk kelulusan perancangan. Adalah hujah perayu-perayu bahawa perintah pembangunan tersebut, yang dikeluarkan oleh responden pertama tanpa mengadakan perbicaraan umum, adalah tidak sah. Tiada isu bahawa untuk menggunapakai APBD 1976 di Wilayah Persekutuan Kuala Lumpur ('WP'), perlulah terdapat pemberitahuan warta oleh Menteri. Perayu-perayu menegaskan bahawa APBD 1976 telah mula beroperasi di WP atas pelantikan tarikh mula berkuat kuasa oleh Menteri berhubung Akta (Pindaan) Perancangan Bandar dan Desa 2001 ('APPBD 2001') di WP, manakala responden-responden berhujah bahawa APBD 1976 merupakan undang-undang umum perancangan bandar dan desa yang tidak terpakai ke atas WP. Responden-responden berhujah bahawa Menteri tidak boleh menggunapakai APBD 1976 untuk beroperasi di WP tanpa pemansuhan Akta (Perancangan) Wilayah Persekutuan 1973 ('APWP'), perundangan spesifik yang hanya terpakai ke atas WP. Sebagai jawapan perayu-perayu berhujah bahawa APBD 1976 hendaklah dibaca secara bersama dengan APWP. Perayu-perayu juga berhujah bahawa k 5 Kaedah-Kaedah Perancangan Pembangunan 1970 sebagaimana dipinda oleh Kaedah-Kaedah (Pindaan) Perancangan (Pembangunan) 1994 ('k 5') tidak lagi beroperasi kerana tidak konsisten dengan s 22 APB 1976. Hakim Mahkamah Tinggi telah menolak permohonan semakan kehakiman perayu-perayu untuk membatalkan perintah pembangunan tersebut, dan justeru itu rayuan ini. Dalam menentukan isu sama ada perayu-perayu mempunyai hak untuk menuntut perbicaraan umum mahkamah ini terlebih dahulu perlu menentukan sama ada APBD 1976 adalah terpakai dan kini berkuat kuasa di WP.

Diputuskan, menolak rayuan tanpa perintah berhubung kos:

(1) Mahkamah ini mendapati s 1(5) APPBD 2001 tiak memberikan Menteri kuasa nyata agar APBD 1976 berkuat kuasa di WP. Hanya dengan pelantikan tarikh mula kuat kuasa APPBD 2001 juga tidak mempunyai kesan menjadikan APBD 1976 terpakai ke atas WP. Dalam apa keadaan APPBD 2001 tidak membuat apa-apa pindaan kepada s 21(7) APBD 1976, yang merupakan peruntukan memberikan hak kepada perbicaraan umum yang dituntut oleh perayu-perayu (lihat perenggan 32–36 & 38–39).

(2) Kedua-dua perundangan yang patut dibaca secara harmoni bukanlah APBD 1976 dan APWP tetapi APPBD 2001 dan APWP. Pada pendapat

mahkamah ini cara untuk membaca APPBD 2001 dan APWP secara harmoni adalah dengan membaca peruntukan-peruntukan APPBD 2001 yang terpakai kepada WPKL untuk membentuk perundangan berasingan yang patut dibaca dan ditafsirkan sebagai sebahagian daripada korpus undang-undang perancangan bandar KL. Walau bagaimanapun, di mana peruntukan-peruntukan APPBD 2001 adalah tidak konsisten dengan peruntukan-peruntukan APWP, peruntukan-peruntukan APWP patut mengatasi, kerana peruntukan-peruntukan APWP adalah peruntukan-peruntukan perundangan perancangan bandar yang digubal khusus untuk KL. Dalam konteks ini, mahkamah ini bersetuju dengan pemakaian hakim Mahkamah Tinggi terhadap maxim *'generalia specialibus non derogant'*. Oleh itu, kesan pemberitahuan warta hanya memberi penguatkuasaan di KL terhadap peruntukan APPBD 2001 yang membentuk rejim pengawalseliaan dengan objektif memastikan keseragaman undang-undang dan polisi. Pelantikan tarikh mula kuat kuasa APPBD 2001 oleh Menteri tidak memberi kesan menidakkan penguatkuasaan APPBD 2001 atau mana-mana bahagian APBD 1976 di KL (lihat perenggan 42–43, 49–54).

(3) Berikutan itu persoalan memberikan perayu-perayu perbicaraan umum di bawah APBD 1976 berhubung bantahan-bantahan mereka terhadap pembangunan atas tanah subjek tersebut tidak timbul (lihat perenggan 56).

(4) Oleh sebab APBD 1976 tidak terpakai ke atas KL, isu k 5 tidak konsisten dengan peruntukan APBD 1976 tidak timbul. Selanjutnya, di bawah k 5 hak untuk membantah permohonan untuk kebenaran perancangan berkaitan pembangunan adalah terhad kepada permohonan yang melibatkan 'increase in residential density or change of the use of land' tetapi perintah pembangunan dalam kes ini tidak melibatkan isu sedemikian. Oleh itu, k 5 tidak terpakai dalam kes ini dan perayu-perayu tidak mendapat hak untuk didengar di bawah rukun ini (lihat perenggan 60–63).

(5) Responden pertama jelas telah mengambil kira perkara-perkara, yang dalam budi bicaranya, dengan segera atau sewajarnya bagi tujuan perancangan yang teratur berkaitan pembangunan atas tanah subjek tersebut. Dengan mengenakan syarat-syarat yang sebenarnya mengutarakan kebimbangan utama perayu-perayu, responden pertama telah melaksanakan budi bicaranya di bawah s 22 APWP sewajarnya dengan mengeluarkan perintah pembangunan tersebut. Oleh itu, mahkamah ini mendapati bahawa hakim Mahkamah Tinggi telah membuat keputusan yang betul dengan menolak permohonan perayu-perayu untuk semakan kehakiman. Walau bagaimanapun, hakim Mahkamah Tinggi terkhilaf dalam penemuan beliau bahawa permohonan perayu-perayu dicemari dengan kemasukan lima pemohon

yang bukan pemilik tanah bersebelahan. Hakim Mahkamah Tinggi patut membenarkan lima pemohon tersebut dikeluarkan daripada guaman tersebut. Oleh itu bahagian penemuan hakim Mahkamah Tinggi ini telah diketepikan (lihat perenggan 68, 86–86, 93–35).

(6) (oleh **Jeffrey Tan HMR, menentang**) Adalah fakta yang tidak dinafikan bahawa APPBD 2001 yang telah meminda APBD 1976 dan bahawa tanpa APBD 1976, APPBD 2001 tidak boleh diterimapakai. Apabila s 1(5) APPBD 2001 diberikan oleh Menteri kuasa untuk melantik tarikh mula kuat kuasa 'Akta ini', ia bermaksud APBD 1976 sebagaimana yang dipinda oleh APPBD 2001 yang berkuat kuasa di WP. Oleh itu APBD 1976 sebagaimana dipinda oleh APPBD 2001 hendaklah dibaca sebagai satu teks sahaja (lihat perenggan 16, 19 & 20).

(7) (oleh **Jeffrey Tan HMR, menentang**) Nyata tiada konsisten antara k 5, yang memperuntukkan perbicaraan umum hanya berkaitan permohonan yang melibatkan 'increase in residential density or change of the use of lang', and ss 21 dan 22 APBD 1976, yang memperuntukkan untuk perbicaraan umum untuk apa-apa permohonan bagi kebenaran perancangan. Walau bagaimanapun, k 5 merupakan kaedah yang digubal di bawah suatu Akta, iaitu ia merupakan perundangan subsidiari. Adalah undang-undang tetap bahawa apa-apa undang-undang subsidiari yang tidak konsisten dengan mana-mana Akta adalah tidak sah setakat mana ia tidak konsisten. Di Malaysia, prinsip am pentafsiran statutori dikodifikasikan dalam s 23 Akta Taksir. Oleh itu, perayu-perayu telah diberikan hak untuk membantah dan untuk didengar, kerana s 21(7) APBD 1976 sebagaimana dipinda menghendaki responden pertama mendengar perayu-perayu (lihat perenggan 22 & 26).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 254–279.

Cases referred to

Australian Crime Commission and anor v NTD8 (2009) 257 ALR 445 (refd)
Blair v Chicago [1906] USSC 64; 201 US 400, SC (refd)
Commissioner of Stamps v Telegraph Investment Co Ptv Ltd and anor (1995) 133 ALR 130, HC (refd)
Faridah Ariffin v Dr Lee Hock Bee & anor [2006] 1 CLJ 660, HC (refd)
Hashim Hj Jasin v Pegawai Pengurus Pilihanraya Mohd Daud Abdul Hamid & ors [2008] 8 MLJ 402; [2008] 5 CLJ 387, HC (refd)
HSBC (M) Trustee Bhd v Kong Kim Hoh & ors [1999] 3 MLJ 383, HC (refd)
Hyde Park Residence Ltd v Secretary of State for the Environment, Transport and the Regions and another [1999] 3 PLR 1, QBD (refd)
Ipmuda Bhd v Eurodec Development and Construction Sdn Bhd [2009] 2 MLJ 464; [2009] 2 CLJ 711, HC (refd)

Kirmani v Captain Cook Cruises Pty Ltd and anor (1985) 58 ALR 29, HC (refd)
Law Kin Man, Re; Anwide Co Ltd v Attorney-General [1994] 2 HKC 118, HC (refd)
Lim Pey Lin v Chia Foon Tau & anor [2001] MLJU 626; [2002] 1 CLJ 420, HC (refd)
MBf Capital Bhd & Anor v Tommy Thomas & Anor (No 6) [1999] 1 MLJ 139; [1998] 3 CLJ Supp 390, HC (refd)
R v Secretary of State for Social -Security, ex parte Joint Council for the Welfare of Immigrants [1997] 1 WLR 275, CA (refd)
Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim [2008] 3 MLJ 753, FC (refd)
Sweeney v Fitzhardine & ors (1906) 4 CLR 716, HC (refd)
United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin [2002] 2 MLJ 385; [2002] 2 CLJ 413, FC (refd)
United Overseas Bank (Malaysia) Sdn Bhd v UJA Sdn Bhd & Another Appeal [2009] 6 MLJ 857; [2010] 6 CLJ 204, CA (refd)
Vickers, Sons and Maxim, Limited v Evans [1910] AC 444, HL (refd)
Yap Hong Choon v Dr Pritam Singh [2005] MLJU 533; [2006] 1 CLJ 842, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 43(6)
City of Kuala Lumpur (Planning) Act 1973
Companies (Winding-Up) Rules 1972 r 87
Constitution Amendment (No 2) Act 1973
Constitution Amendment (No 2) Act 1984
Constitution Amendment Act 2001
Courts of Judicature Act 1964 s 96(a)
Evidence Act 1950
Federal Constitution arts 1(2), 39, 74(1), 80(1), (2), Ninth Schedule, Federal List, List I, Item 27, List III, Item 5
Federal Territory (Planning) Act 1982 ('FTPA') ss 2(2), 22(4), 64
Interpretation Act 1987 [AU] s 12
Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) ss 3, 23, 24, 34
Malaysia Act 1963
Planning (Development) Rules 1970 r 5
Rules of the Federal Court 1995 r 137
Rules of the High Court 1980 O 15 r 6(1), (2), O 34 r 4(2)(f)
Town and Country Planning Act 1976 ss 1(2), (3), 21, 21(6), (7), A, 22, 22(1)
Town and Country Planning (Amendment) Act 2001 ss 1, 1(4), (5), 2A, 2B, 15, 16A, 16B, 22

N Sivarasa (Balbir Singh with him) (Daim & Gamany) for the appellants.
Romesh Abraham (Janice with him) (Shook Lin & Bok) for the first respondent.

RR Sethu (JD Goonting and ML Lum with him) (ML Lum &Co) for the second respondent.

Jeffrey Tan JCA:

MINORITY JUDGMENT

[1] This is an appeal against the refusal of the court below to grant an order of certiorari to quash the development order dated 2 October 2007 for the development of the second respondent's land (Lots 37180, 37184–37198, 37203–37219, 37223–37237, 37239–37255, 37357–37262, hereinafter collectively referred to as the said land) at Bukit Gasing, Kuala Lumpur.

[2] In the court below, the appellants contended that the development order, which was issued by the first respondent without a public hearing, was void. The appellants contended (i) that there was non-compliance of ss 21, 21A and 22 of the Town and Country Planning Act 1976 (Act 172), (ii) that the amendments to the Planning (Development) Rules 1970, the Planning (Development) Rules 1994, were ultra vires the Federal Territory (Planning) Act 1982 (Act 267), (iii) that the Planning (Development) Rules 1970 provided for the appellants to be heard in connection with any application for planning permission on adjourning properties, and (iv) that in any event, the amendments to the Planning (Development) Rules 1970 have not taken away the right of the appellants to be heard.

[3] But all issue on the validity of the amendments to the Planning (Development) Rules 1970 were not taken up for consideration by the learned trial judge who held that it was not open to the appellants to advance that issue at the hearing, as the appellants, by their solicitors' letter dated 12 June 2008 to the respondents, had confirmed that the appellants would not challenge the amendments to the Planning (Development) Rules 1970.

[4] All the appellants claimed locus standi as owners of neighbouring lands. But it came to light, at the stage of submissions, that five of the 108 appellants were not such owners. Thereupon, those five appellants sought leave to withdraw as applicants. But that was turned down by the learned trial judge, who held that the application for judicial review was a joint application that was not divisible or severable (see p 29 of the appeal record). The learned trial judge further held that it was not a case of misjoinder of parties but where 'persons who are not registered owners of adjoining properties … had applied jointly with those who are registered owners and had obtained interim orders against the respondents', that 'it is too late … for the applicants concerned to withdraw', and that the application of the appellants 'suffered from infirmities

of lack of good faith, candour and full and frank disclosure of material facts'. And according to the learned trial judge, that was reason enough to dismiss the application.

[5] The alternate and or second ground of the learned trial judge for dismissal of the application was that 'the (appellants) had no locus standi and no legal basis to demand … a public hearing before … a decision on the 2nd Respondent's application for planning permission' (see 41AR), which I will first take up for scrutiny.

[6] For the territory of Kuala Lumpur, planning permission was once governed by the City of Kuala Lumpur (Planning) Act 1973 until repeal by the Federal Territory Planning Act 1982 (FTPA 1982). Section 64 of the FTPA 1982 empowered the authority appointed under the Federal Capital Act 1960, with the approval of the Minister, to make 'rules generally for the better carrying out of the provisions of the FTPA 1982.

[7] In the exercise of the powers conferred by that s 64, the authority, with the approval of the Minister, made the Planning (Development) (Amendment) Rules 1994 which amended the Planning (Development) Rules 1970. One amendment in particular was the substitution for r 5 of the 1970 Rules with the following r 5.

5.

(1) Upon receipt of an application for planning permission in respect of a development which involves increase in residential density or change of use of land, the Commissioner shall determine whether the proposed development —

(a) is proper and may, subject to further inquiry, be considered; or

(b) is inappropriate for the purpose of proper planning.

(2) If the Commissioner is of the opinion that the proposed development is inappropriate for the purpose of proper planning, he shall reject the application.

(3) If the Commissioner is of the opinion that the proposed development is proper and may, subject to further inquiry be considered, he shall, by way of advertisement in two local newspapers, one of which shall be in the national language, give notice of the proposed development and of the right to make objections by any person claiming to be —

(a) the registered owners of lands adjoining the land to which the application relates;

(b) the registered owners of lands separated by any road, lane, drain or reserved land the width of which does not exceed twenty metres and

whose lands would be adjoining the land to which the application relates had the lands not been separated by such road, lane, drain or reserved land; and

(c) the registered owners of land located within the distance of two hundred metres from the boundary of the land to which the application relates if, the access road to the land to which the application relates is a cul-de-sac and the registered owners of land use the same cul-de-sac.

(4) The advertisement as required under paragraph (3) shall be advertised for three consecutive days and the space of the advertisement column shall not be less than 12 cm X 20 cm.

(5) Any registered land owner as specified in paragraph (3)(a), (b) and (c) may, within four weeks from the date of advertisement, submit his objection, in writing to the Commissioner and when submitting his objection he shall indicate clearly his name, lot number and local postal address.

(6) The Commissioner shall, after the expiry of the time specified in paragraph (5), fix a time and place to hear the registered land owners who have filed their objections in respect of the proposed development.

(7) The Commissioner may, after taking into consideration the objections, if any, grant or refuse to issue the planning permission in respect of the proposed development.

(8) …

(9) …

[8] Under the new r 5, the question of public hearings only arises where 'the application for planning permission in respect of a development which involves increase in residential density or change of use of land'. In contrast, under the former r 5, the need to hear objections arises in every application for planning permission. Hence, under the new r 5, the right to object has been cut back and is limited to the circumstance where the application for planning permission in respect of a development involves increase in residential density or change of use of land. Now given that it was not disputed that the amendments to the 1970 Rules were valid and given that the application for planning permission by the second respondent did not involve an increase in density or change of use of land, I must consign myself to agree that under the new r 5 the appellants could not object to the application of the second respondent for planning permission.

[9] But the new r 5 is not the entire embodiment of all laws relating to public hearings of objections to planning permission. Under the Town and Country Planning Act 1976 (TCPA 1976), (i) owners of neighbouring lands are conferred the right to be informed of proposed developments, and to object, (ii) the approving authority must hear objectors, who in lodging their

objections, have requested a hearing (see ss 21(6) and 21(7) of the TCPA 1976), and (iii) the approving authority decides on the application for planning permission after objections have been dealt with (see s 22(1) of the TCPA 1976). However, even on enactment, the TPCA 1976 does not automatically come into operation in the respective States. The State appoints the date for the TCPA 1976 to come into operation. The TCPA 1976 provides that 'this Act shall come into operation in a State on a date or dates to be appointed by the State Authority, with the concurrence of the Minister, by notification in the State Gazette' (s 1(2) of the TCPA 1976), and that 'the State Authority may bring this Act into operation in any manner the State Authority thinks most advantageous, convenient, expedient, or practicable, whether by appointing different dates for different provisions of this Act, by appointing different dates for different local authority areas or parts thereof, by bringing a provision into operation generally in the State and at the same time declaring that, for or until such time as may be specified, the provision shall or shall not apply to or in relation to a local planning authority or the area or any part of the area of a local planning authority to such extent only as may be specified, or in any other manner' (see s 1(3) of the TCPA 1976).

[10] There was no issue that to bring the TCPA 1976 into operation in the Federal Territory, the Minister must do so by notification in the Gazette. In issue however was whether the TPCA 1976 has been brought into operation in the Federal Territory. While the appellants contended that it has been brought into operation in the Federal Territory by the Town and Country Planning (Amendment) Act 2001 (TCPA 2001), the respondents contended it has not. The respondents further contended that since the Federal Territory (Planning) Act 1982 has not been repealed, r 5 applies, and that the entire provisions of the TPCA 1976, in particular those provisions on public hearings, have not been brought into operation in the Federal Territory by the TCPA 2001. The first respondent furthermore argued that the TCPA 2001 only empowers the Minister to bring 'this Act' (by that the first respondent meant only the 2001 Act) and not the TCPA 1976 into operation in the Federal Territory, and that the TCPA 2001 is 'self contained' and could stand alone with the FTPA, without the TCPA 1976.

[11] Section 1 of the TCPA 2001 reads as follows:

1. Short title, application and commencement.

(1) This Act may be cited as the Town and Country Planning (Amendment) Act 2001.

(2) This Act applies to Peninsular Malaysia.

(3) Sections 2, 3, 4 and 5 come into operation on the date of publication of this Act in the *Gazette*.

(4) Subject to subsection (3), this Act comes into operation in a State on a date

to be appointed by the State Authority, with the concurrence of the Minister, by notification in the State *Gazette*, and the State Authority may appoint different dates —

(a) for the coming into operation of this Act in different areas or parts of the State;

(b) for the coming into operation of different provisions of this Act; or

(c) for the coming into operation of different provisions of this Act in different areas or parts of the State.

(5) Subject to subsection (3) and notwithstanding the provisions of subsection (4), in relation to a Federal Territory, this Act comes into operation on such date as the Minister may, by notification in the *Gazette*, appoint.

[12] There could be no question about it. Section 1(5) of the TCPA 2001 says that 'this Act' comes into operation on such date as the Minister may, by notification in the *Gazette*, appoint. There could also be no question about it that in the exercise of the powers conferred by the aforesaid sub-s 1(5) of the TCPA 2001, the Minister appointed 1 March 2002 as the date on which 'the Act comes into operation in the Federal Territory', by the following gazette notification PU (B) 60 dated 20 February 2002:

TOWN AND COUNTRY PLANNING (AMENDMENT) ACT 2001

APPOINTMENT OF DATE OF COMING INTO OPERATION

IN exercise of the powers conferred by subsection 1(5) of the Town and Country Planning (Amendment) Act 2001 [Act A1129], the Minister appoints 1 March 2002 as the date on which the Act comes into operation in the Federal Territory of Kuala Lumpur.

Dated 20 February 2002.

[KPKT(S) 01/704/64 Jld. 6; PN(U2)2161/IV]

DATO' SERI ONG KA TING

Minister of Housing and

Local Government.

[13] Although the TCPA 2001 provides (i) for the coming into operation of this Act in different areas or parts of the State, (ii) for the coming into operation of different provisions of this Act, or, (iii) for the coming into operation of different provisions of this Act in different areas or parts of the State, the Minister opted to bring the entire TCPA 2001 into operation in the Federal Territory, without any proviso or qualification under sub-s 1(4) of the TCPA 2001.

[14] Notwithstanding that gazette, it was argued by the respondents, and in the event it was accepted by the learned trial judge (i) that the Minister could not bring the TCPA 1976 into operation in the Federal Territory without repeal of the FTPA 1982, (ii) that the FTPA 1982 was enacted exclusively for the Federal Territory, and (iii) that TCPA 2001 does not make the TCPA 1976 applicable to the Federal Territory, and (iv) that for the provisions of the TCPA 1976 to be applicable to the Federal Territory, the amendments must be incorporated in the TCPA 2001:

> I find nothing in Act A1129 to suggest that by s 1(5) the Minister is empowered to bring Act 172 into force in the Federal Territory. Section 1(5) clearly provides that the Minister may by notification in the Gazette appoint a date 'this Act' comes into operation in the Federal Territory. Thus s 1(5) restricts the Minister to bring into force in the Federal Territory only Act A1129 and not its principal Act 172. Pursuant to the power conferred by s 1(5) of Act A1129, the Minister had vide Gazette notification dated 20 February 2002 appointed the date 1 March 2002 as the date on which Act A1129 came into force in the Federal Territory. There is no provision in Act A1129 that repeals Act 267. I am unable to agree with counsel for the applicant that Act 172 and Act 267 should be read harmoniously together. As submitted for the respondents, Act 267 is a specific legislation for the control and planning in the Federal Territory. By virtue of the maxim *generalia specialibus non derogant*, I find that Act 172 does not apply to the Federal Territory. Insofar as control and planning in the Federal Territory is concerned, the first respondent is bound by the provisions of Act 267 and the Planning (Development) Rules 1970 which are in force as affirmed by the Court of Appeal in *Datuk Bandar Kuala Lumpur v Zain Azahari Zainal Abidin* [1997] 2 CLJ 248 wherein the court said:
>
> > … the Federal Territory (Planning) Act 1982, as well as the Rules made thereunder, including the Planning and Development Rules 1970 which remain in force until the present day.

[15] I have considered the latter passage with all due care, but with respect to the learned trial judge, I only find myself at odds with the views expressed that the Minister could only bring the TCPA 2001 but not the TCPA 1976 into operation in the Federal Territory, that only the TCPA 2001 was brought into operation, and that the TCPA 1976 does not apply to the Federal Territory.

[16] In saying that 'section 1(5) restricts the Minister to bring into force in the Federal Territory only Act A1129 and not its principal Act 172', the learned trial judge had in effect held that an amending law could stand alone, free of the amended law. But that ruling contravenes clear written law, for s 34 of the Interpretation Act 1948 and 1967 (Consolidated and Revised 1989) (Interpretation Act) clearly provides that 'where a written law amends another written law, the amending law shall be read and construed as one with the amended law'. The meaning of s 34 is so plain and straightforward, that there is only one local authority, cited later, that saw the need for any enunciation.

[17] There are however more authorities in Australia on the construction of amended law with amending law. In *Sweeney v Fitzhardinge & ors* (1906) 4 CLR 716, where the construction of the amending law was in issue, the High Court of Australia held that the effect of s 12 of the Interpretation Act 1897 of New South Wales, which read 'Every Act amending an Act shall be construed with the amended Act and as part thereof, unless the contrary intention appears in the amending Act', is that the amending law 'is to be read as part of the [amended] law' (per Griffith CJ at p 726). 'The amending Act should not be read in isolation. It is part of the [amended] Act, and that Act should be construed as one enactment' (*Australian Crime Commission and anor v NTD8* (2009) 257 ALR 445). 'An amending law takes its character in part from the amended law and in part from its own terms …' (*Kirmani v Captain Cook Cruises Pty Ltd and anor* (1985) 58 ALR 29 per Gibbs CJ). (In the United States, following *Blair v Chicago* [1906] USSC 64; 201 US 400, there is a plethora of authorities affirming the principle that an amending law and an amended law are to be read as one).

[18] Section 34 of the Interpretation Act is a tad different from the Australian provision. But the effect is no different. The amending law must be construed not only within the context of the whole amending Act, but also in the context of the principal Act as a whole (*HSBC (M) Trustee Bhd v Kong Kim Hoh & ors* [1999] 3 MLJ 383). Indeed, 'the effect of amending legislation is ascertained by the tenor of the principal and the amending legislation read as forming parts of a whole' (*Legislative Drafting* (4th Ed), by GC Thornton at p 403). Where it is a textual amendment, that is, where the text of the Act to be amended is expressly altered by the deletion, substitution or addition of words in a specified place or places, 'the effect is that the instrument [the amended law] can be reprinted as amended, and remains a single text. Where the passage to be altered is described as running 'from' a specified word, phrase or other part of the instrument being amended, it includes that word, phrase or other part. Similarly, where the passage to be altered is described as running xto' a specified word, phrase or other part, it includes the word, phrase or other part' (*Bennion on Statutory Interpretation* (5th Ed), at p 288).

[19] The TCPA 1976 as amended by the TCPA 2001 must be read as a single text, as 'one connected and combined statement of the will of Parliament …' (see *Sweeney v Fitzhardinge* at p 735). ' … the principle that every Act amending another Act shall, unless the contrary intention appears, be construed with such other Act and as part of it, represents the modern approach to construction of an amended statute' (*Commissioner of Stamps v Telegraph Investment Co Ptv Ltd and anor* (1995) 133 ALR 130 per Brennan CJ, Dawson and Toohey 33).

[20] It could not be denied that it is the TCPA 2001 that amended the TCPA

1976. But without the TCPA 1976, the TCPA 2001 would be no more than disjointed words and or incomplete sentences, and even complete sentences would be without context. Without the TCPA 1976, the TCPA 2001 would be incomprehensible. Even the so-called new parts of the TCPA 2001, which are replete with insertions and amendments, could not stand alone without the TCPA 1976. The TCPA 2001 is not a free standing piece of legislation. Taking, in the main, the form of a textual amendment, the TCPA 2001 had 'lost its separate identity on enactment' (*Legislative Drafting* by GC Thornton at p 141). On enactment of the TCPA 2001, the TCPA 1976 was amended in one single text (see *Bennion* at p 289), irrespective of whether it would be brought into operation by any of the State Authorities or by the Minister. The TCPA 1976 as amended was then there, awaiting the States and the Minister to bring it into operation. Thus, when the Minister brought 'this Act' into operation, it was not the TPCA 2001, which on enactment had lost it separate identity which was brought alone into operation. It was the TCPA 1976 as amended by the TCPA 2001, as a single text, that was brought into operation in the Federal Territory.

[21] I also find that the ruling, that FTPA 1982 is the specific legislation and that by virtue of the maxim *generalia specialibus non derogant*, the TCPA 1976 — does not apply to the Federal Territory, could not be sustained.

[22] It is granted that there is undoubtedly conflict or inconsistency between r 5 and TCPA 1976. That is quite obvious. Whereas ss 21–22 of the TCPA 1976 provide for public hearings of objections in any application for planning permission, r 5 only provides for public hearings where the application for planning permission in respect of a development involves increase in residential density or change of use of land. Under the TCPA 1976, the appellants had the right to lodge their objections and to be heard. But under the new r 5, the appellants would have no such right, as the proposed development did not involve increase in density or change of use of and.

[23] That aforesaid conflict or inconsistency was certainly perceived by the learned trial judge, who would not, if otherwise, have applied the maxim *generalia specialibus non derogant*, a tool of interpretation to resolve conflict or inconsistency between a special Act and a general Act. But the maxim *generalia specialibus non derogant* was misapplied.

[24] It is accepted that the FTPA 1982 has not been expressly repealed. There are two Acts, the FTPA 1982 and the TCPA 1976, standing side by side, perhaps one as a special Act, and perhaps the other as a general Act. Let it also be accepted that the FTPA 1982 is the special Act while the TCPA 1976 is the general Act. But the FTPA 1982 is not in issue. The conflict or inconsistency in issue is between the new r 5 and the TCPA 1976. It is the new r 5 that is in

controversy. However, it was not discerned that the new r 5, it being a rule made under an Act, is subsidiary legislation. And when that crucial distinction was not made, it escaped the learned trial judge that the conflict or inconsistency in issue is between subsidiary legislation (for the definition of subsidiary legislation, see s 3 of the Interpretation Act) and an Act.

[25] In this case of conflict between subsidiary legislation and an Act, rather than the maxim *generalia specialibus non derogant*, what is applicable is the general principle of statutory interpretation 'that subsidiary legislation may not be broader than the enabling legislation. Such a principle is given statutory effect in Hong Kong by section 28(b) of Cap 1 which provides that no subsidiary legislation shall be inconsistent with the provisions of any ordinance' (*Re Law Kin Man: Anwide Co Ltd v Attorney-General* [1994] 2 HKC 118). ' … the general rule is that specific statutory rights are not to be cut down by subordinate legislation passed under the vires of a different Act (see *R v Secretary of State for Social -Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275 at pp 290–293) … subordinate legislation cannot repeal or modify primary legislation unless there is a power given by primary legislation that enables such delegated legislation to have that effect' (*Hyde Park Residence Ltd v Secretary of State for the Environment, Transport and the Regions and another* [1999] 3 PLR 1 per Henry U). That general principle is also codified in many common law jurisdictions. One case in point is s 19(c) of the Interpretation Act of Singapore which provides that 'no subsidiary legislation made under an Act shall be inconsistent with the provisions of any Act'.

[26] In Malaysia, that general principle of statutory interpretation is codified in s 23 of the Interpretation Act, which provides that 'Any subsidiary legislation that is inconsistent with an Act (including the Act under which the subsidiary legislation was made) shall be void to the extent of the inconsistency' (s 23 of the Interpretation Act). The effect of s 23 is as plain as a pikestaff. Subsidiary legislation that is inconsistent with the parent Act is void (see *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin* [2002] 2 MLJ 385; [2002] 2 CLJ 413, where the Supreme Court held, per Abdul Malek Ahmad FCJ, as he then was, that in the event of inconsistency or. conflict between subsidiary legislation and the parent Act, the parent Act prevails by reason of s 23 of the Interpretation Act; *Hashim Hj Jasin v Pegawai Pengurus Pilihanraya Mohd Daud Abdul Hamid & ors* [2008] 8 MLJ 402; [2008] 5 CLJ 387, where Zainal Adzam Abd Ghani J held that with the deletion of the provision under which the subsidiary legislation was made, the subsidiary legislation becomes ultra vires the Act).

[27] And any subsidiary legislation that is inconsistent with any Act is void (see *MBf Capital Bhd & anor v Tommy Thomas & anor (No 6)* [1999] 1 MLJ

139; [1998] 3 CLJ Supp 390, where it held by RK Nathan JC, as he then was, that the rules of court could not override the express provisions of the Defamation Act; *Lim Pey Lin v Chia Foon Tau & anor* [2001] MLJU 626; [2002] 1 CLJ 42, where it was held by Low Hop Bing J, as he then was, that a rule of ethics must give way to the provisions of an Act; *Faridah Ariffin v Dr Lee Hock Bee & anor* [2006] 1 CLJ 660, where it was held by Abdul Malik Ishak J, as he then was, that 'any subsidiary legislation that runs counter to an Act of Parliament would be rendered void'; *Yap Hong Choon v Dr Pritam Singh* [2005] MLJU 533; [2006] 1 CLJ 842, where it was held by Tee Ah Sing J, as he then was, that O 34 r 4(2)(f) of the Rules of the High Court, being subsidiary legislation, cannot override the Evidence Act 1950 or the Courts of Judicature Act 1964; and *Ipmuda Bhd v Eurodec Development and Construction Sdn Bhd* [2009] 2 MLJ 464; [2009] 2 CLJ 711, where it was held by Rohana Yusuf J that since the conflict between r 87 of the Companies (Winding-Up) Rules 1972 and s 43(6) of the Bankruptcy Act was not a case of conflict between a specific law and a general law, therefore the maxim *generalia specialibus non derogant* did not apply, and that the said r 87, being subsidiary legislation could not override s 43(6) of the Bankruptcy Act). As for the apex court, in *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim* [2008] 3 MLJ 753, it was held by the Federal Court per Zaki Azmi PCA, as he then was, that r 137 of the Federal Court, being subsidiary legislation, could not be read to override s 96(a) of the Courts of Judicature Act 1964. Clearly, therefore, no subsidiary legislation can be inconsistent with any Act. 'Unless the enabling Act so provides, delegated legislation cannot override any Act …' (*Bennion* at p 244).

[28] When the TCPA 1976 as amended was brought into operation in the Federal Territory, the new r 5 was rendered void to the extent of the inconsistency. The new r 5 was rendered a dead letter, to the extent that the stipulation on the right to object and to be heard as being restricted to the circumstance where the development involves increase in residential density or change of use of land was to all intents and purposes effaced, without repeal of the rule. Effectively, the appellants (other than the five concerned) were thereby bestowed the right to object and to be heard. Each appellant had that right. And each appellant had locus standi, regardless of the locus standi of the others. It was a joint application. But rights were individual and severable. The application for judicial review was also severable. Those five appellants concerned could withdraw from the application, just as any litigant could from any proceeding. As a condition for withdrawal, they could be ordered to pay costs and damages occasioned by the interim reliefs hitherto obtained. But to refuse those five appellants concerned to withdraw from the proceeding could not be sanctioned. When it was revealed that those five appellants concerned, who were not exactly busybodies but occupiers of the neighbouring lands and kin of the registered owners who were not within the jurisdiction, had no locus standi, the right and proper thing to do was to strike them off as applicants. But

to hold that want of locus standi of those five appellants concerned was ground enough for dismissal of the application by all was, with respect, to collectively punish all appellants.

[29] Section 21(7) of the TCPA 1976 as amended required the first respondent to hear the appellants. The minutes recorded by the Ministry of the Federal Territory of the meeting on 10 May 2007 (first meeting) between the Ministry of the Federal Territory, the respondents and appellants, stated that the appellants could lodge objections prior to the approval of planning permission — (see pp 861–865AR). That was again stated by the Ministry of Federal Territory vide its letter dated 27 June 2007 — 'Sidang Awam oleh DBKL perlu diadakan dan pemunya tanah berjiran di beri peluang membuat sejajar dengan local agenda 21. Pemilik tanah yang berjiran dengan tapak projek akan diberi peluang membuat bantahan apabila kebenaran merancang be lakukan oleh DBKL kelak selaras dengan undang-undang' (see 892AR). But despite all that, there were no public hearings, for when the first respondent and appellants next met on 14 November 2007 (it was common ground that the meeting on 14 November 2007 was not a public hearing — see 797AR and 909AR), planning permission had already been granted (on 2 October 2007). In spite of s 22(1) of the TCPA 1976 as amended which required the first respondent to deal first with objections under s 21(7), the first respondent had decided on the application for planning permission without compliance of s 21(7) and s 22(1) of the TCPA 1976 as amended.

[30] The stand of the first respondent was that a public hearing could not be conducted as the proposed development did not involve increase in density or change of use of land — 'Oleh kerana cadangan yang dikemukakan oleh [2nd Respondent] tidak melibatkan penambahan kepadatan penduduk atau melibatkan pertukaran kegunaan tanah, maka prosedur 'pelawaan bantahan' adalah tidak boleh dilakasanakan kerana akan menyalahi peraturan dan kaedah-kaedah sedia ada' (see 918AR). In my considered view, that stand was wrong. Before any decision on the application for planning permission, the appellants should be first heard. In that they were not, there was a failure by the first respondent to comply with the law. I would allow this appeal by those 103 appellants as well as the related appeal (W-01–637 of 2010) which by prior agreement is to follow the result of this appeal.

Zaharah Ibrahim JCA:

JUDGMENT (MAJORITY)

INTRODUCTION

[31] On 6 March 2012 we heard the appeal by the appellants from the

decision of the learned High Court judge in Kuala Lumpur who dismissed the application by the appellants for judicial review to quash the development order dated 2 October 2007 ('development order') granted by the first respondent, the Commissioner of the City of Kuala Lumpur ('Datuk Bandar') in respect of several parcels of land ('subject land') owned by the second respondent on Bukit Gasing, Kuala Lumpur.

[32] This appeal (Appeal No W-01–607 of 2010) in fact arose from the second application (R1–25–137 of 2008) by the appellants for judicial review. There was an earlier application (R1–25–38 of 2008) for judicial review of the decision by the first respondent as communicated by his letter dated 31 December 2007 informing the owners of adjoining properties that there would not be a hearing of their objections.

[33] The hearing of Application No R1–25–38 of 2008 was stayed pending the disposal of Application No R1–25–137 of 2008 which is the subject matter of this appeal.

[34] When the learned High Court judge dismissed the application in R1–25–137 of 2008, Her Ladyship also dismissed the application in R1–25–38 of 2008. The dismissal of that application in R1–25–38 of 2008 led to the filing of Appeal No W-01–637 of 2010.

[35] Parties however agreed that this appeal (No W-01–607 of 2010) was the substantive appeal and the decision in this appeal would bind the other appeal.

[36] Having heard and read the submissions of the parties and read the record of appeal, by a majority (our learned brother Jeffrey Tan, now FCJ, being in the minority) we dismissed the appeal.

[37] We now give our grounds for our majority judgment.

BRIEF BACKGROUND FACTS

[38] The subject land comprised 71 lots of land, each held under a separate individual title. Each is subject to the category of 'building'. The separate individual titles were issued in 1977.

[39] The appellants claimed to be owners of properties adjoining the subject land.

[40] The appellants' complaint in respect of the development order was essentially that they were not granted a right of public hearing before the

development order was issued.

ISSUE

[41] The appellants' case was that the development order issued by the first respondent was void for having been issued in excess of jurisdiction and in breach of natural justice as it was made without the appellants being granted a right of public hearing.

[42] The appellants' claim to the right of a public hearing was principally based upon sub-s 21(6) and (7) of the Town and Country Planning Act 1976 ('TCPA').

[43] The appellants claimed that the TCPA, in particular ss 21 and 22 of the TCPA, had been made applicable to the Federal Territory of Kuala Lumpur ('Kuala Lumpur') by virtue of the appointment of the date of coming into operation of the Town and Country Planning (Amendment) Act 2001 ('Act A1129') by the Minister under sub-s 1(5) of Act A1129, as published in the *Gazette* on 1 March 2002 ('PU (B) 60/2002').

[44] It was their contention that since they were not accorded a public hearing of their objections to the development proposed by the second respondent on the subject land, the development order was void.

[45] The principal question to be answered therefore was whether the TCPA has been made applicable to, and is now in force in, Kuala Lumpur ('legislation issue').

[46] The issue of whether a public hearing had in fact been accorded to the appellants would only need to be considered if the answer to the principal question was in the affirmative.

[47] If the answer was in the negative, the question of according the appellants a public hearing under the TCPA did not arise.

[48] There were also several subsidiary matters which were raised by the appellants, particularly their right to a hearing under r 5 of the Planning (Development) Rules 1970, and the duty of the Datuk Bandar under sub-s 22(4) of the Federal Territory (Planning) Act 1982 ('FTPA'). For the sake of completeness, we shall also address these matters in this judgment.

PRINCIPAL ISSUE: LEGISLATION ISSUE

FTPA vis-a-vis TCPA

[49] The TCPA was enacted in 1976. At that point in time the City of Kuala

Lumpur already had its own town planning regime under its own legislation, in the form of the City of Kuala Lumpur (Planning) Act 1973 [Act 107].

[50] When Act 107 was repealed and replaced in 1982, Parliament did *not* choose to replace it by extending the TCPA to Kuala Lumpur, but instead replaced it with a specific legislation applicable only to the Federal Territory of Kuala Lumpur, namely the FTPA.

[51] The FTPA (as was Act 107) was enacted by Parliament under the powers conferred upon it by art 74 cl (1), read together with Item 27 of List I (the Federal List) in the Ninth Schedule to the Federal Constitution. Being a matter in the Federal List, executive authority over matters in the FTPA is vested in the Federation, as provided for in art 80 cl (1) of the Federal Constitution.

[52] The TCPA on the other hand was enacted pursuant to the legislative power conferred on Parliament by art 74 cl (1) of the Federal Constitution, read together with Item 5 of List III (the *concurrent list*) in the Ninth Schedule to the Federal Constitution.

[53] In accordance with the provisions of art 80 cl (2) of the Federal Constitution, as town and country planning is a matter in the concurrent list, the executive authority of the Federation did not, prior to Act A1129, extend to such matter except in so far as may be provided for by federal law or State law.

[54] As such, prior to Act A1129 the Federation did not have any authority over the execution of the provisions of the TCPA. The preamble to Act A1129 however, made it clear that one of the purposes of the Act was to confer executive authority on the Federation over certain matters in relation to the control and regulation of town and country planning. The preamble also made it clear that Act A1129 was primarily enacted for the purpose of ensuring uniformity of law and policy for such control and regulation.

[55] The FTPA is clearly a specific town planning law designed solely for Kuala Lumpur, with the Federation having executive authority over the whole of the FTPA, while the TCPA is a general town and country planning law meant for the rest of Peninsular Malaysia, with the Federation having executive authority only over certain aspects of the TCPA.

[56] At this juncture it is perhaps useful to address the contention of the appellants that the substitution of the words 'Peninsular Malaysia' for the words 'local authority areas of the States of Malaya' in the TCPA would now bring the TCPA into force in Kuala Lumpur.

[57] It must be pointed out that art 1 cl (2) of the Federal Constitution, in which the term 'States of Malaya' appeared prior to 27 August 1976, no longer contains that term upon the coming into force of the Constitution (Amendment) Act 1976 on that date (some four months after the TPCA was enacted). This amendment did not materially change the legal position that a reference to 'States of Malaya' includes also a reference to the Federal Territory of Kuala Lumpur, by virtue of the provisions of sub-s 2(2) of the Federal Constitution (Amendment) Act 1983 which came into force retrospectively on 1 February 1974.

[58] It should also be pointed out that the term 'Peninsular Malaysia' as defined in s 3 of the Interpretation Acts 1948 and 1967 was substituted for the term 'West Malaysia', *not* the 'States of Malaya', by the Interpretation (Amendment) Act 1997.

[59] Theoretically, under sub-s 1(2) and (3) of the TCPA (which have been left intact by Act A1129) the relevant State Authority for the Federal Territory of Kuala Lumpur (which must be the Yang di-Pertuan Agong under art 39 of the Federal Constitution since there is no law which provides otherwise) could make the TCPA applicable to Kuala Lumpur in view of the fact that the City of Kuala Lumpur (in the Federal Territory of Kuala Lumpur) is a local authority area. However, that has clearly not been done. Kuala Lumpur continues to have its own separate legislation in respect of town planning, and the FTPA is that legislation.

[60] The substitution of the words 'Peninsular Malaysia' for the words 'local authority areas, of the States of Malaya' could not therefore be the answer to the question of whether the TCPA had been made applicable to Kuala Lumpur. For the answer to that question we had to look elsewhere.

Effect of PU (B) 60/2002

[61] The Minister had, in exercise of his powers under sub-s 1(5) of Act A1129, appointed 1 March 2002 as the date on which that Act came into operation in the Federal Territory of Kuala Lumpur.

[62] It is rather unfortunate that the Minister's appointment of the date of coming into force of Act A1129 in the Federal Territory of Kuala Lumpur was drafted in such general terms, thus paving the way for the arguments by the appellants that by PU (B) 60/2002 the TCPA is now applicable in Kuala Lumpur.

[63] We agreed with the learned High Court judge that sub-s 1(5) of Act

A1129 grants the Minister the power to appoint the date of coming into force in Kuala Lumpur of 'this Act'. We agreed that 'this Act' could only mean Act A1129 itself.

[64] In *United Overseas Bank (Malaysia) Sdn Bhd v UJA Sdn Bhd & Another Appeal* [2009] 6 MLJ 857; [2010] 6 CLJ 204, Gopal Sri Ram FCJ, delivering the judgment of the Court of Appeal, quoted Lord Loreburn in the case of *Vickers, Sons and Maxim, Limited v Evans* [1910] AC 444 at p 445 as follows:

> My Lords, this appeal may serve to remind us of a truth sometimes forgotten, that this House sitting judicially does not sit for the purpose of hearing appeals against Acts of Parliament, or of providing by judicial construction what ought to be in an Act, but simply of construing what the Act says. We are considering here not what the Act ought to have said, but what it does say; … The appellants' contention involves reading words into this clause. The clause does not contain them; and we are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.

[65] Nowhere in Act A1129 do we find a provision which confers upon the Minister the power to appoint a date of coming into force of the TCPA in Kuala Lumpur, and therefore by implication repealing the FTPA. But the effect of the appellants' submissions is that we should read such a provision into the Act.

[66] Subsection 1(5) does not confer upon the Minister the express power to bring the TCPA into force in Kuala Lumpur. The mere appointment of a date of coming into force of Act A1129, cannot also have the effect of making the TCPA applicable to Kuala Lumpur.

[67] All the amendments in Act A1129 which are essentially direct (or textual) amendments of the specific provisions of the TCPA could not possibly have been intended to apply as if they were amendments to the FTPA either. They are peculiar to the framework of the TCPA prior to the amendments by Act A1129. Examples of such amendments are amendments to s 15, the insertion of new ss 16A–16B, the amendments to s 22 and the various amendments which relate to penalties.

[68] In any case it must be noted that Act A1129 does not make any amendment to sub-s 21(7) of the TCPA (which is the provision granting the right of public hearing that is being claimed by the appellants). In the case of the amendment to sub-s 21(6), it merely extends the right to lodge objections to owners of 'neighbouring lands' (as defined in the new sub-s 21(8)) instead of limiting such right to owners of land adjoining the land to which the application for planning permission relates.

[69] The Minister could not possibly appoint, under sub-s 1(5) of Act A1129, a date for the coming into force in Kuala Lumpur of a provision (namely sub-s 21(7)) which is not even in that Act.

Application of Act A1129 to Kuala Lumpur

[70] How then must we interpret the effect of PU(B) 60/2002? In what manner can Act A1129 be applicable to Kuala Lumpur?

[71] The appellants submitted that the TCPA must be read harmoniously with the FTPA. We disagree.

[72] In our view, the two pieces of legislation that must be read harmoniously together are *not* the TCPA and the FTPA, but Act A1129 and the FTPA.

[73] However, reading the two pieces of legislation harmoniously does not include inserting into the FTPA amendments in Act A1129 clearly meant to be inserted into the specific framework of the TCPA, neither does it include 'grafting' provisions of the TCPA into the FTPA.

[74] The TPCA was originally designed to operate at the State level and below. Except for the requirement for the concurrence of the Minister to bring the TCPA into operation in a State, the TCPA operates within the individual State, with the local planning authorities, the State Planning Committee and the State authority playing their assigned roles under the TCPA, consistent with the fact that the executive authority over the TCPA was solely with the State as has been stated above.

[75] Act A1129 contains two separate types of provisions. It was, in a manner of speaking, a dual purpose Act, as can be seen from its provisions.

[76] It was intended, on one level (the macro-level), to create a new supervisory regime for town and country planning at a national and regional level for the purpose of ensuring uniformity of law and policy. To achieve this it became necessary for Parliament to confer upon the Federation the relevant executive authority under art 80 cl (2) of the Federal Constitution.

[77] On the other level (the micro-level), Act A1129 performs the usual role of 'upgrading' specific provisions of the existing regime of the TCPA.

[78] It is the group of provisions which creates a new supervisory regime above the existing State level (with the executive authority of the Federation

coming into play) that is clearly intended to apply throughout Peninsular Malaysia, including Kuala Lumpur. In particular, these are:

(a) the provisions creating a National Physical Planning Council (s 2A) with powers to make rules (sub-s 58(1A));

(b) the provisions providing for the role for the federal Director General of Town and Country Planning (s 2B);

(c) the provisions creating a Regional Planning Committee (Part IIA); and

(d) the provisions to enable the drafting of a national physical plan (Part IIB).

[79] In our view, the way to read Act A1129 and the FTPA harmoniously is to read those provisions of Act A1129 which, as mentioned above, create the new supervisory regime with the objective of ensuring uniformity of law and policy, as being part of the planning law of Kuala Lumpur. Those provisions do *not* become *directly* a part of the FTPA in the same way that they are inserted into and become part of the TCPA.

[80] In other words, those provisions of Act A1129 that are applicable also to Kuala Lumpur constitute, in fact, a separate piece of legislation that must however be read and construed as part of the corpus of town planning laws of Kuala Lumpur.

[81] The resultant position (namely, reading and construing two pieces of legislation as if they are an integral whole) is not unknown in our legislative history. Some notable examples are the Malaysia Act 1963, the Constitution (Amendment) (No 2) Act 1973 which created the Federal Territory of Kuala Lumpur, the Constitution (Amendment((No 2) Act 1984 which created the Federal Territory of Labuan, and the Constitution (Amendment) Act 2001 which created the Federal Territory of Putrajaya. Each of those Acts contains provisions which are not direct (or textual) amendments of the Federal Constitution but must be read together with the Federal Constitution to enable a clearer picture to emerge of the constitutional framework of the Federation of Malaysia.

[82] However, where the provisions of Act A1129 are inconsistent with the provisions of the FTPA, the provisions of the FTPA must prevail. As has been mentioned above, the provisions of the FTPA are provisions of a town planning legislation designed specifically for Kuala Lumpur. In this context, we agree with the learned High Court judge's application of the maxim *'generalia specialibus non derogant'*.

Conclusion

[83] Based on our analysis as set out above, we were of the view that the effect

of PU(B) 60/2002 was merely to bring into force in Kuala Lumpur those provisions of Act A1129 which create the new supervisory regime with the objective of ensuring uniformity of law and policy only.

[84] PU(B) 60/2002 does not have the effect of bringing into operation the rest of Act A1129 in Kuala Lumpur, and certainly does not have the effect of bringing into force any portion of the TCPA in Kuala Lumpur.

[85] The answer to the principal question of whether the TCPA has been made applicable to, and is now in force in, Kuala Lumpur, is therefore in the negative.

[86] Consequently, the question of according the appellants a public hearing under the TCPA of their objections to the development on the subject land did not arise.

[87] Any right of the appellants to object to any development on the Subject Land must depend on the FTPA and the rules made under the FTPA.

SUBSIDIARY ISSUES

[88] We shall now deal with the subsidiary issues.

Rule 5 of the Planning (Development) Rules 1970

[89] The appellants submitted that r 5 of the Planning (Development) Rules 1970 is no longer operative for being inconsistent with s 22 of the TCPA.

[90] We have dealt above with the issue of the applicability of the TCPA in Kuala Lumpur. We have concluded that the TCPA does not apply to or and has no force of law in Kuala Lumpur. As such, the issue of r 5 being inconsistent with the provisions of the TCPA does not arise.

[91] We noted that r 5 limits its scope only to cases where the planning permission applied for 'involves increase in residential density or change of the use of land'.

[92] That the development order did not involve an increase in residential density nor a change in the use of land was not in dispute.

[93] Therefore r 5 does not apply in the circumstances of this case and the

appellants did not acquire a right of hearing under the rule.

Section 22(4) of the FTPA

[94] The appellants submitted that even if the TCPA does not apply in Kuala Lumpur the Datuk Bandar was duty bound to comply with sub-s 22(4) of the FTPA.

[95] We need to state that from our perusal of the development order it was clear to us that the development order is merely an approval for the *layout plan* of the development of the subject land as proposed by the second respondent. This is clear from Items 2 and 4 of the conditions to which the development order was made subject. The second respondent was required to apply for a separate development order for the actual construction.

[96] We shall now deal with the complaint by the appellants in relation to sub-s 22(4) of the FTPA.

[97] Subsection 22(4) of the FTPA reads as follows:

> (4) The Commissioner in dealing with an application for planning permission shall take into consideration such matters as are in *his discretion* expedient or necessary for purposes of proper planning and in this connection but *without prejudice to the discretion of the Commissioner* to deal with such application, the Commissioner shall, *as far as practicable* have regard to —
>
> (a) the provision of the development plan and where the local plan has not been adopted, the Comprehensive Development Plan; and
>
> (b) any other material consideration:
>
> Provided that, in the event of there being no local plan for an area and the Commissioner is satisfied that any application for planning permission should not be considered in the interest of proper planning until the local plans for the area have been prepared and adopted under this Act then the Commissioner *may* either reject or suspend the application. (Emphasis added.)

[98] It was crystal clear, particularly in view of the underlined words, that under sub-s 22(4) of the FTPA wide discretion is granted to the Datuk Bandar. There is no requirement in that subsection for the Datuk Bandar to conduct a hearing or even to consult owners of neighbouring land before he makes his decision on an application for planning permission or before he issues a development order.

[99] The requirement for such consultation and hearing is provided for in r 5 which has been discussed above, and which we found to be inapplicable in this

case.

Development order issued subject to conditions

[100] The development order was issued subject to a number of conditions which were relevant to the concerns of the appellants, in particular the environmental impact of the proposed development on the subject land. Of particular concern to them were the dangers of hillside or hill slope development.

[101] The concerns of the appellants on hill slope development appeared to have been addressed by condition 17 of the development order which required the second respondent to comply with the guidelines issued by the Ministry of Housing and Local Government on hill slope development. This would mean compliance with the 'Garis Panduan Pembangunan Di Kawasan Bukit' issued by that Ministry on the directive of the Federal Cabinet in 1997 ('Garis Panduan').

[102] We also noted that conditions 15–16 of the development order required the second respondent to maintain as much as possible the original contour of the subject land, and to carry out minimal cutting and levelling (and that too only for the purpose of providing the infrastructure and the relevant structures). The second respondent was required to turf the cut surfaces and to maintain them so as to ensure that no erosion occurred. This was consistent with the requirements in the *Garis Panduan*.

[103] Item 7 of the conditions imposed in the development order stipulated that no development was allowed, including earthworks, until the approval of a further development order was obtained and the approval of the land office and of other relevant departments had been obtained.

[104] Item 13 of the conditions required the second respondent to contact and consult with the Department of Public Works (presumably of the city hall) and the Department of Drainage and Irrigation for detailed proposals on the drainage and road systems proposed for the subject land before submitting the final plans for the development.

Total Planning and Development Guidelines No 1/2001

[105] The appellants had referred in their submissions to the *Total Planning and Development Guidelines No 1/2001* issued by the Department of Town and Country Planning of the Ministry of Housing and Local Government (*exh RA-28 in bahagian C jilid 5/8*).

[106] We believed the appellants have misunderstood the nature and purpose of those Guidelines.

[107] Para 1.2 of the guidelines clearly states the intention of the guidelines as follows:

(i) To provide guidelines on physical development by assimilating the principles of Total Planning and Development Doctrine;

(ii) To assist Local Authorities, State Authorities and developers, as well as other parties involved in the practice of town and country planning process and development; and

(iii) As a guide for the preparation plans and other planning guidelines.

[108] In their conclusion at para 6.0, the authors of the guidelines state as follows:

> The Total Planning and Development Guidelines which have been prepared is a new paradigm in the practice of planning and development. The Town and Country Planning Department is confident that *if* planning and development is implemented based on these Guidelines, a harmonious relationship will be created not only among men but also between man and the environment, that is, the result of man's awareness and sensitivity towards his relationship with the Creator.
>
> The Total Planning and Development Guidelines covering several major sectors of planning has been prepared *with the hope* of it being applied as a guide for planning practitioners at all levels, ft is hoped that planning and development which is based on these Guidelines will avoid, or at least minimise destruction and damages to man, environment and the country.
>
> This Total Planning and Development Guidelines *should* be applied hand in hand with the planning guidelines and standards prepared by the Town and Country Planning Department and other detailed standards prepared by the Environmental Department, Public Works Department, the Sewerage Department and other related technical departments. (Emphasis added.)

[109] The guidelines are quite obviously nothing more than mere advisory literature, although issued by the Town and Country Planning Department. They have no force of law. Neither are they directives which need to be complied with, unlike the *Garis Panduan* referred to above.

[110] There was therefore no necessity for the Datuk Bandar to comply with the guidelines, or even to consider them.

Structure plan and local plan

[111] The appellants also raised the issue of non-compliance with the structure plan and local plan.

[112] We noted that while Kuala Lumpur has had a structure plan since 2004 (the KL Structure Plan 2020), its local plan was in the midst of preparations at the material time.

[113] In the absence of a local plan, the Datuk Bandar is required by sub-s 22(4) of the FTPA to have regard to the comprehensive development plan in dealing with an application for planning permission.

[114] No issue was raised that the Datuk Bandar paid no regard to the comprehensive development plan in dealing with the second respondent's application for planning permission. In any case, as mentioned above, such regard is without prejudice to the full and wide discretion conferred upon him under that subsection.

[115] There is no reference in sub-s 22(4) of the FTPA to the structure plan. We therefore were of the opinion that in considering the application for planning permission by the second respondent under the FTPA, the Datuk Bandar was not required to have regard to the structure plan.

[116] Even if we were wrong in our opinion that the Datuk Bandar was not required to have regard to the structure plan in considering the application for planning permission, we noted that the appellants' concern in this connection related to those portions of the KL Structure Plan 2020 which deal with development on hill slopes. The appellants highlighted para 747 of the KL Structure Plan 2020 as being one requirement which the Datuk Bandar had failed to comply with.

[117] Paragraph 747 of the KL Structure Plan 2020 states as follows:

> 747. Development on hillside shall be given serious attention in accordance with the prevailing rules and regulation and policies adopted by the government. In particular, the 'fit to terrain' concept in layout design should be applied in all developments in hilly locations.
>
> Policy:
>
> EN 6: CHKL shall not permit development on hillside with slope that exceeds the allowable level, rules and regulations set by the Federal Government.
>
> EN 7: CHKL shall ensure that geo-technical study is carried out for all hillside developments.

[118] The *Garis Panduan* contains the relevant requirements set by the Federal Government that need to be complied with for development on hill slopes.

[119] Paragraph 3.2.H of the *Garis Panduan* defines hills with slopes having a gradient of 25 degrees and above as high risk hill areas. However, the *Garis Panduan allows* development on such areas if strict conditions are imposed. Paragraph 5 of the *Garis Panduan* and Appendix D to the *Garis Panduan* set out the control measures to be observed in relation to such hillside development.

[120] As we have mentioned above, condition 17 of the development order required the second respondent to comply with guidelines issued by the Ministry of Housing and Local Government on hill slope development, and that the *Garis Panduan was* such a guideline.

[121] By issuing the development order with the condition that the the second respondent comply with the *Garis Panduan* the Datuk Bandar had in fact complied with the provisions of para 747 and Policy EN 6 of the KL Structure Plan 2020.

[122] As for the requirement for a geo-technical study referred to in Policy EN 7, it did not appear to be in dispute that such a study had been carried out. In any case, the requirement was one of the control measures stipulated in the *Garis Panduan*.

CONCLUSION

[123] The Datuk Bandar had clearly taken into consideration matters which were, in his discretion, expedient or necessary for purpose of proper planning in relation to the development on the subject land.

[124] Having imposed the conditions that actually addressed the main concerns of the appellants, the Datuk Bandar, in our view, had exercised his discretion under s 22, in particular sub-s 22(4) of the FTPA reasonably in issuing the development order.

DECISION

[125] Having carefully considered all the issues in this appeal, and in particular the principal issue and subsidiary issues discussed above, we were satisfied that the learned High Court judge made the correct decision in dismissing the applications for judicial review by the appellants. The appeal was therefore dismissed.

[126] We however disagreed with the learned High Court judge's finding that the application was tainted by the inclusion of the five applicants who were not, at the material time, owners of the neighbouring lands.

[127] In our view, the applications by the five applicants to withdraw from the suit should have been allowed by the learned High Court judge. We were of the view that O 15 r 6(2) of the Rules of the High Court 1980 ('RHC') is wide enough to permit such applications to be allowed. In any case, we were of the view that O 15 r 6(1) of the RHC allows the court to determine the issues in dispute so far as they affect the rights and interest of the rest of the applicants who are the proper parties to the suit. We therefore ordered that that part of the finding be set aside.

[128] We should state that the order stated in para 97 above was a unanimous order of the panel.

[129] In view of the circumstances of the appeal, we made no order as to costs.

Appeal dismissed with no order as to costs.

Reported by Kohila Nesan